United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

626

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,440

GILBERT GREEN, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

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DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

Cr. No. 1152-64

QUESTIONS PRESENTED

1. Was appellant's right to jury trial validly waived where:

a) he signed a waiver form in open court in the presence of counsel;
b) the waiver form was also signed by appellant's Legal Aid attorney, consented to by the government and approved by the court;
c) defense counsel in the presence of appellant orally agreed to the court's statement, "I understand you have waived the jury trial";
d) appellant made no objection during his two-day trial by the court;
e) five weeks earlier appellant's three-day jury trial on the instant charges, at which he was represented by the same Legal Aid attorney as below, resulted in a "hung" jury; and
f) appellant makes no allegation that he did not understand that he was waiving his right to a trial by jury?

2. Was the denial of appellant's motion for a transcript of his preliminary hearing at government expense, made for discovery purposes, reversible error where no abuse of judicial discretion is shown and where trial counsel, who did not represent appellant at the preliminary hearing, did represent him at an earlier trial on the same charges which terminated in a "hung" jury?

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Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After a trial before Judge Edward M. Curran, sitting without a jury on April 13 and 14, 1966, appellant was found guilty as indicted of housebreaking, grand larceny and unauthorized use of a vehicle (22 D.C. Code §§ 1801, 2201 and 2204).[1] He was sentenced to imprisonment for a term of from two to six years, to run concurrently with his sentence in Cr. No. 1018-63,[2] and now appeals.

[1] Five weeks earlier a mistrial was declared when appellant's jury was unable to agree upon a verdict.

[2] On January 17, 1964 Judge Curran sentenced appellant in an unrelated conviction for unauthorized use of a vehicle to imprison-

The first matter at appellant's trial was the execution of the form waiving appellant's right to trial by jury (Tr. 3).[3] In the ensuing bench trial it was stipulated that the three alleged crimes actually occurred: a 1955 two-door Chevrolet convertible owned by Robert Hutchins was taken from the possession of an automobile mechanic to whom it had been entrusted for transmission repairs on October 26, 1964 (Tr. 4); a warehouse belonging to C. Kramer Johnson, Inc. was forcefully violated and certain items, including 24 cases of scotch whiskey, having an aggregate value of $1712.70, were stolen on or about October 27, 1964 (Tr. 5, 6). The trier of the facts was thus left only with the question of whether appellant was the perpetrator of the crimes. Appellant, together with an "acquaintance", William C. Simpson, Jr., was caught

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ment for from one to three years (Cr. No. 1018-63), but suspended the sentence in favor of three years' probation. Judge Curren, however, revoked probation after a hearing on the day of sentencing in the instant case and the jail term was reimposed.

[3] The following document was signed in open court:

United States District Court
For The District of Columbia

United States
v. Criminal No. 1152-64
Gilbert Green

WAIVER OF TRIAL BY JURY

With consent of the United States Attorney and the approval of the Court, the defendant waives his right to trial by jury.

/s/ Gilbert Green
Defendant

/s/ George P. Lamb
Attorney for
Defendant.

I consent

/s/ John Wall
United States Attorney

Approved

/s/ Curran
Judge

in the act of transferring the stolen whiskey from the stolen car to Simpson's car at approximately 2 a.m. on October 27 (Tr. 17, 18, 21, 29, 84).

Sometime after 1 o'clock on the morning of October 27, 1964, Aubrey Hawkins, a Navy Department Employee, was awakened at home by his barking dog (Tr. 7). Peering from his back porch he saw two men alight from a Pontiac automobile parked in the alley and, it appeared to him, start "stripping" a near-by convertible (Tr. 7-9).

Hawkins called the police and kept the figures under surveillance until a squad car from No. 9 precinct and a K-9 cruiser arrived almost simultaneously (Tr. 9, 10, 17, 18, 28, 29). He saw no one other than the two men, whom he could not identify (Tr. 8, 10, 14). Upon arrival of the officers, Hawkins heard someone cry "police" and both men ran, one disappearing in full flight south across the lot, and the other, later identified as appellant, quickly being apprehended in his view (Tr. 10, 13, 18, 19, 21). Officer Hollis B. Harris of the K-9 corps testified that he did not lose sight of appellant from the time he first saw him next to the open trunk of the Pontiac until he arrested him a mere ten feet away (Tr. 18, 19, 25, 26). Variously apportioned between the Pontiac and the stolen Chevrolet convertible, with some cartons still on the ground, were 21 of the 24 stolen cases of whiskey (Tr. 6, 21, 22, 33, 34).

According to the government's theory of the case, appellant had needed an automobile to transfer his "hot" cargo and had injudiciously selected Mr. Hutchins' Chevrolet, which was justifiably in the repair shop due to a defective automatic transmission (Tr. 36, 37, 45, 57). Belated discovery of this malfunction prompted him to go to his friend Simpson for help.

Simpson's father, a cab driver, testified that appellant came to him about 12 o'clock of the night in question requesting him "to go start his car." (Tr. 47-8) Being ready for bed, he refused, but allowed his son to go (Tr. 48-9). Young Simpson testified that he took the "trouble cables" also requested by appellant and that the

two drove in Simpson's Pontiac to the Chevrolet (Tr. 48, 49, 53, 54). Unable to start the Chevrolet, appellant offered Simpson $100 if he could use his Pontiac for two hours (Tr. 54, 59, 61). Simpson agreed, and they were in the process of transferring the whiskey when caught by the police[4] (Tr. 56-62).

Appellant's explanation was, in essence, that he was innocently passing through the alley and was mistakenly arrested (Tr. 78-81). The real culprit, he implied, "ran directly past me" (Tr. 80) just before appellant stepped aside in the alley to let the police car pass and was apprehended (Tr. 81, 91). He admitted going to Simpson's house at approximately 11:45 on the night in question but denied going with him to the alley, denied offering him $100 to borrow the Pontiac, and denied committing the crimes (Tr. 78, 79, 84-87). In his closing argument he attempted to shift the responsibility for the crime to Simpson and the unknown person who sped by him supposedly vanishing into the night (Tr. 98). He was impeached with his prior conviction in 1963 for unauthorized use of a vehicle (Tr. 87).

SUMMARY OF ARGUMENT AND ARGUMENT

I. Appellant's waiver of trial by jury, signed in open court with the concurrence of his attorney, was valid.

(Tr. 3, 87)

Appellant contends that his waiver was invalid because it was not intelligently made and because the trial judge should have exercised his discretion not to accept it. Asserting for the first time on appeal that he "could not possibly have had an absolutely fair trial without a jury before Judge Curran" (Br. p. 13), appellant ascribes as his reasons that 1) Judge Curran, fifteen months earlier, accepted a guilty plea from appellant on

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[4] Simpson was a juvenile at the time of his arrest and was fined by the juvenile court for an A.B.C. violation of transporting more than 12 bottles of whiskey (Tr. 52, 57, 71).

an unrelated charge of unauthorized use of a vehicle and placed him on probation (his prior conviction was revealed anyway at trial during impeachment (Tr. 87)); and 2) Judge Curran refused to put appellant on personal bond while awaiting trial in the instant case. The record conclusively shows that appellant, a few weeks after his first trial ended with a "hung" jury,[5] freely waived his jury right by signing in open court[6] a waiver[7] that fully complied with Fed. R. Crim. P., 23(a).[8] The waiver was signed by appellant's quondam counsel (also appellant's counsel at the mistrial) who, in addition, orally acknowledged in appellant's presence his intent to waive trial by jury (Tr. 3).

The assertion that Judge Curran should not have accepted the waiver because his prior dealings with appel-

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[5] A defendant's familiarity with jury trials has been previously noted by this Court as a factor in determining whether the waiver was intelligently and intentionally made. See *Hensley* v. *United States*, 108 U.S. App. D.C. 242, 245-46, 281 F.2d 605, 608-09 (1960), *affirming* 155 A.2d 77 (D.C. Mun. App. 1959).

[6] Appellant asserts that "apparently" the waiver form was signed before the Judge came on the bench and filed afterwards (Br. p. 13). We disagree. The record reflects that the waiver was executed in court after the case was called by the clerk and in the presence of the Judge.

> THE COURT: . . . I understand you have waived the jury trial.
>
> MR. LAMB: [defense counsel] That is correct. The appropriate papers have not been signed.
>
> THE COURT: Very well.
>
> MR. WALL: [Assistant United States Attorney] Thank you, Your Honor.
>
> (The appropriate papers were signed in open court.) (Tr. 3).

[7] See p. 2, *supra*.

[8] Rule 23, Fed. R. Crim. P., provides in part:

> (a) TRIAL BY JURY. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government.

The Rule was recently upheld by the Supreme Court in *Singer* v. *United States*, 380 U.S. 24 (1965), which rejected a challenge to the constitutionality of the requirement of government consent.

lant must necessarily have engendered bias, suggests the wrong remedy. If Judge Curran had felt himself unable to decide justly appellant's case, he would have been under an obligation to disqualify himself. Surely the answer is not to have a prejudiced judge preside over a jury trial. But as appellant fairly acknowledges (Br. p. 13), the record nowhere indicates that Judge Curren recognized appellant as the same man he put on probation 15 months before. Even if Judge Curran did link appellant with his earlier guilty plea, the probation sentence reflects prior leniency and understanding for appellant. Most importantly, however, the record does not reflect any evidence whatever of bias. Challenges to the integrity of the court should not be upheld on speculation or on a mere conjecture which, in this case, is not even supported by legitimate inferences from the facts at hand.

In answer to appellant's contention that the trial court's failure to interrogate him about his waiver somehow invalidates it, the instant situation finds a carbon copy in a case involving the same waiver form. *Hatcher* v. *United States*, 122 U.S. App. D.C. 148, 352 F.2d 364 (1965), *cert. denied*, 382 U.S. 1030 (1966). There this Court, observing that "the record does not disclose direct communication between the court and the appellant with respect to the waiver", refused to make such communication a *sine qua non* to effective waiver and affirmed the conviction. 122 U.S. App. D.C. at 149, 352 F.2d at 365. So it should be here.[9]

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[9] This Court and others have previously sustained jury waivers where the waiver evidently was not discussed between the court and the defendant. See *Hensley* v. *United States*, *supra* (waiver of the jury made solely by counsel at the bench after voir dire); *Riadon* v. *United States*, 274 F.2d 304, 307 (6th Cir.), *cert. denied*, 364 U.S. 896 (1960) (no error in refusal to allow withdrawal of jury waiver made in open court and signed by defendant, his attorney and the government); *Irvin* v. *Zerbst*, 97 F.2d 257, 258 (5th Cir. 1938), *cert. denied sub nom. Keller* v. *Zerbst*, 303 U.S. 637 (1938) (upholding oral waiver of attorney made in defendant's presence).

Trial tactics, it has been observed, are an important ingredient in a defense counsel's decision to seek a waiver of trial by jury. See *Naples* v. *United States*, 113 U.S. App. D.C. 281, 289, fn. 26, 307 F.2d 618, 626, fn. 26 (1962). Traditionally, this Court has declined the role of a Monday morning quarterback to reexamine trial tactics on appeal. See, *e.g.*, *Bolden* v. *United States*, 105 U.S. App. D.C. 259, 266 F.2d 460 (1959) (trial counsel's decision not to call a witness); *Mitchell* v. *United States*, 104 U.S. App. D.C. 57, 62, 259 F.2d 787, 792, *cert. denied*, 358 U.S. 850 (1958) (in general, trial tactics are "simple facts of trial" and "are not justiciable issues"). Appellant is the author of the waiver by his own hand. Its operation was hedged about with safeguards to his rights: written execution; advice of counsel; public waiver in open court. At trial his waiver was the exercise of his free choice; now, the intervention of a conviction having in his eyes tarnished the wisdom of that choice, he seeks grace from this Court. He has shown no unfairness resulting from the action of the trial court. *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281 (1942). His current intent being only to second-guess his trial tactics, he should be held to the unconditional surrender of his right.[10]

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[10] At least one court has held that waiver of a jury trial is a procedural matter which trial counsel has the power to control "to the exclusion of his client". *Eury* v. *Huff*, 141 F.2d 554, 555 (4th Cir. 1944). Such a conclusion is consistent with the theory that the trial counsel, an expert, ought to be given full and unfettered reign to exercise his expertise. In this regard, this Court, for example, has stated that "Counsel therefore remain free to keep defendants from testifying whenever counsel see fit". *United States* v. *Poe*, 122 U.S. App. D.C. 163, 165, 352 F.2d 639, 641 (1965). The question of the extent of counsel's control over waiver should be resolved, however, in light of the few Supreme Court decisions, which, though to appellee's knowledge have never faced this precise point, have accented the fact that the jury right is personal to the defendant and have implied that its waiver should be a marriage of the advice of counsel and the wish of the defendant. See, *e.g.*, *Adams* v. *United States ex rel. McCann*, *supra* at 275 (1942) (where defendant refused counsel and waived his jury trial, he could choose

II. The denial of appellant's motion for the preliminary hearing transcript at government expense was a proper exercise of judicial discretion; in any event, appellant suffered no prejudice because trial counsel had the opportunity to fully explore the government's case at an earlier trial, which ended in a "hung" jury.

Denial of appellant's pretrial motion[11] for transcription of the minutes of his preliminary hearing[12] was within the discretion of the district court. See *Nickens* v. *United States*, 116 U.S. App. D.C. 338, 341, 323 F.2d 808, 811 (1963), *cert. denied*, 379 U.S. 905 (1964). Appellant has shown no abuse of judicial discretion. Furthermore, any prejudice he may have suffered evaporated when the entire government case was subjected to trial counsel's cross-examination at the earlier mistrial.[13] *Nickens* v. *United States*, *supra*.[14]

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his own fate and follow "the guidance of his own wisdom and not that of a lawyer"); *Patton* v. *United States*, 281 U.S. 276, 312 (1930) (a valid waiver requires the "express and intelligent consent of the defendant."); *cf.* Fed. R. Crim. P., 23(a).

[11] Appellant's motion, supported by points and authorities, was filed on February 9, 1965 by Legal Aid counsel who did not represent appellant at his preliminary hearing at the Court of General Sessions. Essentially two reasons, both in the nature of discovery purposes, were given for requesting the transcript: first, that the "facts and circumstances . . . are unknown to the defendant in detail"; and second, that "there is apparent inconsistent testimony of the arresting officers with respect to facts and circumstances surrounding the arrest". The motion was denied on February 19.

[12] Appellant's preliminary hearing covered only the housebreaking charge. The grand larceny and unauthorized use of vehicle counts in the indictment originated with the grand jury.

[13] Appellant's failure to even request the grand jury minutes, which would have embodied testimony as to all three counts of the indictment, suggests that by the time of the first trial he had satisfied his original discovery needs that prompted his motion for the preliminary hearing transcript. Clearly this was true by the time of the second trial for he did not request transcription of the testimony of government witnesses at the mistrial.

[14] See also *Boney* v. *United States*, D.C. Cir. No. 19,922, affirmed without opinion July 27, 1966 in which the court upheld the denial of a similar motion where the preliminary hearing testimony was available in a tape recording of disputed clarity.

CONCLUSION

Wherefore, it is respectfully submitted that the judgment of the District Court should be affirmed.

DAVID G. BRESS,
United States Attorney.

FRANK Q. NEBEKER,
ROBERT KENLY WEBSTER,
Assistant United States Attorneys.

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